UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

CHAO CHEN,	)	
	)	
Plaintiff,	)	No. CV17-5769RJB
	)	
v.	)	
	)	
THE GEO GROUP,	)	
	)	
Defendant.	)	
	)	
and	)	
	)	
STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE GEO GROUP, INC.,	)	
	)	
Defendants.	)	

MOTION HEARING

August 2, 2018

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:	**Andrew Free** **LAW OFFICE OF R. ANDREW FREE** **Adam J Berger** **Jamal Whitehead** **SCHROETER GOLDMARK & BENDER**
For the Defendants:	**Mark Emery** **NORTON ROSE FULBRIGHT** **Joan Mell** **III BRANCHES LAW**

09:28:53AM MS. MELL: Good morning, your Honor.

09:28:56AM THE COURT: This is further in Nwauzor versus GEO, No. 17-5769, and comes on for oral argument on three pending motions.

09:29:04AM Ms. Mell and Mr. Emery are here for the defendants. Let's see, Mr. Free, Mr. Whitehead, and Mr. Berger are here for plaintiffs.

09:29:14AM A couple of housekeeping matters first. Mr. Chen was dismissed as a plaintiff in the case. He is still on the record as a defendant in the counterclaim. Is that intentional or should he be dismissed from the case?

09:29:28AM MS. MELL: Your Honor, GEO's position --

09:29:40AM THE COURT: Wait a minute. You need to speak right into the mic.

09:29:45AM MS. MELL: GEO's position is that Mr. Chen should remain as a counterdefendant.

09:29:59AM THE COURT: Okay. That's not the subject of today's issues, I just wanted to raise the issue because it wasn't clear to staff.

09:30:02AM There have been a couple of late matters filed, including a letter from ICE, and then the other one a declaration from a Tae Johnson, the last being filed just this morning. Have those things been served on counsel? Do you have those?

09:30:04AM MR. FREE: We do, your Honor.

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09:31:14AM THE COURT: I have read -- I had the week off
09:31:20AM last week, almost. I spent part of that week sitting on a
09:31:26AM deck out on Hood Canal reading stuff, including everything
09:31:34AM filed on these three motions. And then I have reviewed
09:31:43AM since then a good deal of what is in the files. That's a
09:31:50AM lot of reading. This case is way too paper heavy at this
09:32:03AM point.
09:32:05AM Be that as it may, I have read a lot. We have
09:32:10AM discussed it and worked on it in chambers, as well. I set
09:32:16AM this oral argument to give you the opportunity to tell me
09:32:21AM whatever you think is appropriate to say or to argue on
09:32:29AM the issues raised by these three motions. I would ask
09:32:35AM that you limit your comments to 20 minutes a side.
09:32:47AM In the order of filing, the plaintiffs' motions are
09:32:55AM older than the defendants' motion for class certification,
09:33:01AM so I assume you go first.
09:33:23AM MR. WHITEHEAD: Yes, your Honor. I am sorry.
09:33:26AM I'm unclear as to the order.
09:33:29AM THE COURT: You need to speak into the mic. You
09:33:32AM will break your back if you lean over. Just remain seated
09:33:36AM and tell me what's on your mind.
09:33:38AM MR. WHITEHEAD: I just want to make sure that I
09:33:39AM am clear as to the order. Are you asking for plaintiffs
09:33:42AM to argue their class certification motion?
09:33:44AM THE COURT: They made the motion first. They can

argue -- They're all three motions. Anybody can argue within the time limits whatever you want to argue about those three motions. I am mindful that plaintiffs' motion and the defendants' motion regarding class certification are on the same subject.

MR. WHITEHEAD: Then, your Honor, we will go first.

MS. MELL: No. He said --

THE COURT: You won't go first, because they filed first, the motion to deny class certification.

MR. WHITEHEAD: All right. Thank you, your Honor.

MR. EMERY: Good morning, your Honor. My name is Mark Emery of the GEO Group. I would ask if the court would reserve five minutes for rebuttal.

THE COURT: The time is yours. Keep track of it yourself.

MR. EMERY: Your Honor, this is the first opportunity I have had to speak with you on these cases. I am counsel for the GEO Group in all of the detainee work cases that are currently pending right now, in Colorado, both the cases before your Honor, and in California, as well. So I am very aware of the importance of the issues that are sitting before the court today, and the fact that we put a lot of paper in front of you.

09:35:07AM The issues I would like to cover are, first of all, the immunity issue, Yearsley immunity. I will probably spend most of my time on that.

09:35:13AM I would like to say a few things further about the issue of employment, the nature of the employment in question. I will say I have reviewed the past hearing transcripts and read very carefully your Honor's questions that you put forward.

09:35:20AM And I also recognize the importance of the class certification issue, because you are the first court to consider whether a minimum wage claim would be certified for a class. The Menocal case is older, but that, in fact, was dismissed in that case.

09:35:32AM To begin with the Yearsley immunity: The federal government delegates authority to contractors to carry out a number of its different missions, including federal immigration detention. The Yearsley doctrine provides that when the government authorizes a contractor to take certain actions, it directs the contractor, and that authorization is valid, the contractor is entitled to immunity.

09:35:33AM What we are talking about here is the Voluntary Work Program. What is distinctive about this case is that the only claim is a minimum wage claim. The plaintiffs are essentially alleging that we are liable under the

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09:36:39AM 1 Washington Minimum Wage Act for doing exactly what the
09:36:43AM 2 government has told us to do.
09:36:45AM 3 Now, I want to get into the details of that
09:36:48AM 4 authorization and try to make it as clear to you as I can
09:36:53AM 5 why we think we have that authorization and are cloaked in
09:36:58AM 6 immunity.
09:36:58AM 7 One sort of very preliminary remark: When you read
09:37:01AM 8 the nature of the pleadings in this case and the
09:37:03AM 9 arguments, the plaintiffs have gone forward as if they are
09:37:07AM 10 sort of exposing some deep secret that GEO has at the
09:37:13AM 11 Northwest Detention Center, in the way it runs its
09:37:17AM 12 program, the truth could not be further apart.
09:37:20AM 13 What we do is straight up according to the policies
09:37:26AM 14 that ICE put forward in the terms of our contract. We
09:37:29AM 15 operate the Voluntary Work Program in broad daylight. I
09:37:36AM 16 would like to begin with a brief discussion of those
09:37:38AM 17 standards.
09:37:39AM 18 If you don't mind, I will put a couple of things up.
09:37:42AM 19 These are all materials that are in the record. So we
09:37:50AM 20 begin with Section 5.8 of the Voluntary Work Program.
09:37:54AM 21 This is from ICE's national standards.
09:37:56AM 22 The first thing I would point to here is No. 1, where
09:37:59AM 23 it outlines three different kinds of facilities. ICE
09:38:02AM 24 operates three different kinds of facilities: An SPC,
09:38:06AM 25 which ICE runs directly, and two different kinds of

09:38:09AM 1 contract facilities, CDFs and IGSA. The one that is at
09:38:13AM 2 issue is a CDF. The same policies apply at all of these
09:38:19AM 3 different facilities.
09:38:20AM 4 Second, if you look down at 5.8(1)(b) here, you see
09:38:24AM 5 that this is listed as an expected outcome. Number one,
09:38:30AM 6 "Detainees may have opportunities to work," and so on, as
09:38:37AM 7 described here, within the constraints of what we are
09:38:39AM 8 doing at a detention facility.
09:38:42AM 9 Flipping over to Section 5(a), again, this is
09:38:47AM 10 mandatory language, "Detainees shall be provided the
09:38:51AM 11 opportunity to participate in a Voluntary Work Program."
09:38:57AM 12 Now we move to the relevant portions of the contract.
09:39:07AM 13 This is from Page 82 of the contract. We see that one of
09:39:12AM 14 the directives that ICE gives to GEO is to manage --
09:39:16AM 15 THE COURT: Can you erase those arrows that are
09:39:19AM 16 not --
09:39:22AM 17 MR. EMERY: How do I do that? That is
09:39:26AM 18 distracting. Thank you.
09:39:27AM 19 And I thought it might be worthwhile, very quickly,
09:39:32AM 20 just looking at the particular language of this case. So
09:39:34AM 21 the first sentence, "Detainee labor shall be used in
09:39:38AM 22 accordance with the detainee work plan developed by the
09:39:42AM 23 contractor, and will adhere" --
09:39:43AM 24 THE COURT: Just a minute. You are getting ahead
09:39:45AM 25 of me here. I don't know where you are looking at,

09:39:49AM 1 Page 82. I have a copy of the contract here. All right.
09:39:58AM 2 MR. EMERY: This is Page 82 of the contract.
09:40:03AM 3 "Detainee labor shall be used in accordance with the
09:40:06AM 4 detainee work plan developed by the contractor, and in
09:40:09AM 5 accordance with the ICE PBNDS on the Voluntary Work
09:40:14AM 6 Program," which we just looked at.
09:40:16AM 7 So we are not hiding anything here. ICE tells us
09:40:19AM 8 that detainee labor shall be used. It shall be used in
09:40:23AM 9 accordance with its standards.
09:40:25AM 10 Continuing on, "The detainee work plan must be
09:40:28AM 11 voluntary, and may include work or program arrangements
09:40:32AM 12 for industrial, maintenance, custodial, service, or other
09:40:36AM 13 jobs."
09:40:38AM 14 What I would emphasize there is, we are not just
09:40:41AM 15 talking about detainees cleaning their cells, we are
09:40:46AM 16 talking about a wide range of things that ICE has directed
09:40:49AM 17 us to have detainees do.
09:40:52AM 18 Further, "The detainee work program shall not
09:40:55AM 19 conflict with other requirements of the contract, and must
09:40:57AM 20 comply with all applicable laws and regulations."
09:41:02AM 21 We understand that one of the allegations that the
09:41:06AM 22 plaintiffs make in this case is that this phrase somehow
09:41:09AM 23 encompasses the minimum wage law -- Minimum Wage Act.
09:41:18AM 24 This phrase needs to be read in the context of the
09:41:20AM 25 contract itself. One really need look no further than the

very next sentence to understand why detainees aren't GEO's employees.

The next paragraph begins, "Detainees will not be used to perform the responsibilities or duties of an employer" -- "of the contractor." So the contract especially distinguishes between what detainees do, which can be a number of different jobs at the facility, and what employees do.

So moving on to the pay term, which I know is a key issue that is in dispute here. Going back to the PBNDS, I'm sure you are familiar with the language by now, Subsection K of 5.8 states, "Compensation is at least $1 U.S. per day. The facility shall have an established system that ensures the detainees receive the pay owed them before being transferred or released."

The authorization that ICE gives us is to pay at least $1 a day. We pay $1 a day. This is the exact same rate ICE pays at its own facility. This is the same rate that's paid in all of the facilities, unless there is some other arrangement made.

You will notice, too, the second sentence here, "The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released." An important point that I hope has come out in the briefing, and should come out in the

09:42:47AM declarations filed today, and other declarations we filed, Mr. Kimble's in particular, is that GEO doesn't pay -- GEO doesn't decide what to pay detainees.

09:43:01AM THE COURT: They decided $1 a day in their worker's handbook.

09:43:07AM MR. EMERY: Your Honor, ICE decides that it's $1 a day, and we administer that.

09:43:13AM THE COURT: Where does ICE say $1 a day rather than not less than $1 a day?

09:43:23AM MR. EMERY: We can look to another portion of the contract here. Looking at the highlighted portion, this is included in the same contract, "Detainee wages for the detainee work program, reimbursement for this line item via the actual cost of $1 per day per detainee. Contractor shall not exceed the amount shown without prior approval by the contracting officer."

09:43:53AM You can see that there are amounts put there. The rate --

09:43:56AM THE COURT: That's what you get reimbursed for. How does that limit the pay?

09:44:03AM MR. EMERY: That's the amount that ICE pays to detainees. GEO's role in the payment --

09:44:10AM THE COURT: You pay more than that in some facilities, I understand.

09:44:17AM MR. EMERY: I will address that in a moment. I

09:44:20AM 1 want to be clear what this provision says, which is that
09:44:24AM 2 ICE pays $1 to detainees.
09:44:27AM 3 The term "reimbursement rate" may be a little bit
09:44:30AM 4 confusing. It is not a matter of ICE deciding to
09:44:35AM 5 reimburse and GEO being able to pay whatever it wants.
09:44:39AM 6 There is a rate that is set. There is an amount that can
09:44:43AM 7 be paid per year. That is the total amount, $114,975.
09:44:48AM 8 This is what ICE has said, "GEO, you will pay this in a
09:44:52AM 9 year." So essentially a dollar a day, 114,000 of them.
09:44:58AM 10 This is providing 114,900 some daily opportunities --
09:45:03AM 11 THE COURT: What is to prevent you from deciding
09:45:06AM 12 the rate is going to be $2 per day?
09:45:08AM 13 MR. EMERY: Per this exact provision, we have to
09:45:10AM 14 seek ICE's approval on that.
09:45:13AM 15 THE COURT: Why?
09:45:14AM 16 MR. EMERY: Because it says we shall not exceed
09:45:17AM 17 the amount without the approval of the contracting
09:45:19AM 18 officer. And there are clear --
09:45:24AM 19 THE COURT: Isn't that relative to reimbursement
09:45:31AM 20 rather than what you pay detainees?
09:45:40AM 21 MR. EMERY: I really encourage you to not get
09:45:43AM 22 hung up on the idea of reimbursement. This is ICE paying.
09:45:46AM 23 GEO does not pay the detainees. ICE pays the detainees.
09:45:51AM 24 We facilitate the payment.
09:45:52AM 25 THE COURT: I am curious about that. GEO set the

09:46:03AM $1 a day in the employee handbook. I guess I fail to see
09:46:19AM why GEO can't pay more if they choose to out of the
09:46:24AM goodness of their heart.
09:46:27AM MR. EMERY: This is why, your Honor: GEO's
09:46:30AM handbook notes a dollar a day, but GEO doesn't set that
09:46:34AM rate. ICE sets that rate. For example, when detainees
09:46:37AM enter the facility they are given a detainee handbook.
09:46:40AM That detainee handbook, the one in 2014, when this class
09:46:44AM action began, said, "Pay will be $1 per day." That is ICE
09:46:49AM telling every detainee in every facility, whether run by
09:46:53AM ICE or run by us, that pay will be $1 per day. This is
09:46:56AM the rate that ICE sets.
09:46:58AM As for why GEO wouldn't pay -- couldn't pay more, the
09:47:02AM contract says we shall not exceed that amount without
09:47:05AM ICE's approval.
09:47:07AM There are clear reasons why ICE would want that to
09:47:09AM happen. Your Honor, we are in a long-term contracting
09:47:14AM relationship with ICE. Every dollar that comes from ICE
09:47:17AM appropriations to detainees comes from U.S. taxpayers.
09:47:21AM The government has an interest in knowing what's expended
09:47:25AM on this. It sets limits on it. It is not going to allow
09:47:28AM GEO to go pay higher rates.
09:47:31AM Now, you will find in the declaration that was filed
09:47:34AM this morning --
09:47:35AM THE COURT: Wait a minute. Why would the

government not allow you to pay a higher rate? They won't reimburse you for a higher rate, but why would they say you can't pay a higher rate?

MR. EMERY: Look through this contract, the government controls every aspect of what we do at the facility. I mean, look at the line item -- You see the line item here on the top: "Estimating travel costs, including lodging and meals." You will see it has the exact same language in there. You might use the same logic, "Oh, why would the government care how much we spend on lodging and meals?" But that exact same language is in there. The amount that is allocated for it under the contract shall not be exceeded without ICE's approval. ICE wants to control these costs. ICE has an interest in controlling these costs.

You will see in the declaration that was filed this morning, which comes directly from ICE, in Paragraph 24, explains those provisions, "The NWC contract sets the quantity of $1 reimbursements at 114,975 per option year. GEO shall not exceed that quantity without prior approval by the contracting officer. This approval can be sought by GEO and would be memorialized through a bilateral contract modification."

So the rate could be raised. If ICE decides that U.S. taxpayers want to pay $11 to detainees an hour, it

will pass through that amount to detainees, we'll make sure they get paid that amount, and we go on. But it is ICE that funds everything that happens at the detention facility. We are a contractor.

That brings us back to the immunity point. We do all of this within the scope of our authorization. If we started paying a different amount, it actually would be going in a different direction from our authorization. It is in our interest to do what ICE directs us to do, which ultimately is in conformity with what Congress has directed.

That's the second part of the Yearsley test, whether this authorization to run the VWP at the dollar per day rate is validly authorized.

We have given you the text of this. The statute bears close care, 1855(d). It is an old statute, but it contains all of the language that is necessary to continue to direct -- or to infallibly confer authority on ICE to have us run the VWP at a dollar per day. It allocates money from here and for after.

It says Congress may from time to time set a rate, which it has done in different years. It seems to be an item that was sort of stuck in the budget for a long time. It no longer does.

Again, the declaration from ICE that we filed today,

09:50:38AM particularly Paragraph 13, explains that Congress set this
09:50:42AM rate, and that's what their rate continues to be. "Per
09:50:46AM the terms of the contract, as well as authority provided
09:50:48AM above, reimbursement for the Voluntary Work Program is $1
09:50:53AM per day per detainee."
09:50:54AM The last point I want to make on the Yearsley
09:51:02AM immunity is, by asking whether GEO can pay more on its
09:51:10AM own -- this is really missing the point of what's
09:51:13AM happening here, that this is the administration of a
09:51:17AM government program. The government sets what terms the
09:51:21AM U.S. taxpayers will pay for this.
09:51:23AM Paragraph 19 of the declaration filed today says it
09:51:26AM as clearly as can be said: "NWAC has implemented and
09:51:31AM conforms to the current PBNDS. PBNDS requires that
09:51:36AM detainees receive at least $1 per day for work performed
09:51:40AM in the VWP." That is exactly what we do. So we act
09:51:43AM within the government's authorization, and therefore we
09:51:46AM are entitled to immunity.
09:51:50AM If your Honor has no other questions on immunity, I
09:51:53AM will move to other issues.
09:51:54AM THE COURT: Okay. Thank you.
09:51:58AM MR. EMERY: A second point --
09:51:59AM THE COURT: If you wanted to save some time --
09:52:05AM Use your time as you choose, I guess.
09:52:13AM MR. EMERY: As I said, your Honor, I did want to

09:52:21AM touch on some of the broader issues of employment class
09:52:24AM certification, but I imagine these are things I can
09:52:28AM address later.
09:52:59AM MR. FREE: Good morning, your Honor. My name is
09:53:09AM Andrew Free, and I am appearing on behalf of the
09:53:12AM plaintiffs in this case, along with my co-counsel Jamal
09:53:15AM Whitehead. And Adam Berger is here with us, as well. I
09:53:19AM am going to address Yearsley immunity, and Mr. Whitehead
09:53:23AM will address the class certification questions in this
09:53:25AM case that are before the court.
09:53:26AM I will pick up with the court's question, which I
09:53:30AM think is the critical one, and that is the difference
09:53:34AM between a reimbursement rate that is set by the federal
09:53:37AM government about how much ICE will pay GEO back for the
09:53:41AM work that is performed by detained immigrants, and a pay
09:53:44AM rate, which is what GEO is saying ICE has authorized it to
09:53:48AM set. So it is the difference between the floor to the
09:53:51AM ceiling.
09:53:51AM We have Docket No. 101-1, 101-2, and 101-3, a
09:53:59AM judicial admission that GEO can and does pay more than a
09:54:02AM dollar at other facilities that it operates with contracts
09:54:05AM with ICE. We've got examples of the invoices that GEO
09:54:09AM sends to ICE documenting the reimbursement rate that ICE
09:54:14AM will pay for, and the GEO billable rate that GEO pays when
09:54:18AM it needs to have a higher rate in order to get detainees

09:54:21AM 1 to do the jobs so that it can function. And we've got an
09:54:24AM 2 example of a page from a GEO detainee manual at another
09:54:28AM 3 one of its facilities.
09:54:29AM 4 The reason we filed those things is because the
09:54:31AM 5 statements that have been made in briefing about a uniform
09:54:34AM 6 national policy of only paying detainees $1 a day are not
09:54:38AM 7 factually accurate. Those statements are not true. There
09:54:40AM 8 are dozens of facilities in this country, including at
09:54:43AM 9 least three that I know of that are run by GEO, in which
09:54:46AM 10 the contractor pays more, and the government approves it.
09:54:49AM 11 And that's as it should be. Because according to the
09:54:52AM 12 declaration submitted by ICE today, this morning, that was
09:54:55AM 13 received by GEO last night at 4:45 -- 4:42, GEO is
09:55:00AM 14 responsible for designing and implementing the
09:55:04AM 15 performance-based requirements, including the
09:55:08AM 16 work program. That is in the contract language, at
09:55:11AM 17 Page 82, that my friend pointed out to the court.
09:55:15AM 18 Throughout this declaration Mr. Johnson makes clear
09:55:19AM 19 that the contractor is required for coming up with the
09:55:25AM 20 work plan and determining how it is going to be run.
09:55:29AM 21 I can point the court to the paragraphs. I have only
09:55:32AM 22 had a little bit of time to review it. It says
09:55:35AM 23 explicitly, "Performance-based contracts do not designate
09:55:38AM 24 how a contractor is to perform the work, but rather
09:55:42AM 25 establishes the expected outcomes and results that the

government expects." That's Paragraph 8.

Throughout this declaration, at Paragraph 9, at Paragraph 12, and Paragraph 13, the language is that of reimbursement. The answer to the question, "Why does it say a dollar as the reimbursement rate," is because it is the reimbursement rate.

The defendant does not address the key other provisions in the contract which require GEO to ascertain on a rolling basis what its legal requirements are, its state/local legal requirements, and comply with the most stringent standard.

In that respect, GEO is much more like the contractor in Campbell-Ewald versus Gomez, where the federal government said you have to make sure that you comply with the notification requirements before you attack somebody. It's like the contractor in Cunningham.

I think Salim is instructive here. In Salim the Eastern District of Washington reviewed claims of derivative sovereign immunity by contractors. It was key that those contractors had a discretionary role in formulating the way that the program worked. That destroyed Yearsley prong 1, which was the authorization. That discretion, that contractual delegation of authority to determine how it works, which we see in this declaration from ICE, the first time we have seen it, the

first time the court has seen it, that's the way GEO operates at the Northwest Detention Center.

And it begs the question, if GEO can pay two or three bucks at the south Texas facility, and the LaSalle detention facility, why can't it pay 11 here?

There is no legal impediment from Congress. That is black letter appropriations law. We cited it at Page 13 of our response. And appropriators will tell you that the law is, an appropriations bill is valid for the period of the appropriation.

Now, there is an authorization for payment of detainees out of the lump sum allocation of money to DHS every year. That is an authorization, okay -- it's the authority that Congress has given ICE to pay.

But the appropriation is two parts. The appropriation does not specify a wage rate, and it has not since 1978. I think the court grasped that in its prior rulings.

In 1939 the Supreme Court said that the government does not become a conduit of its immunity in suits against its agents and instrumentalities merely because they do its work. That is the proposition that is before this court on GEO's motion to dismiss on Yearsley immunity. GEO is saying, "Because we have a contract with the government, ipso facto, they blessed everything we are

doing, they have authorized everything we are doing, and that's enough. We are immune." That is simply not the law.

OIG Document 18-67 was released June 26th, 2017. That is the Department of Homeland Security's Office of Inspector General. It is titled, "ICE's inspections and monitoring of detention facilities do not lead to sustained compliance or systemic improvements." The fact that the contract -- the fact that GEO continues to operate the facility does not equal ICE's authorization of everything it does there.

So we think that GEO's motion fails at prong 1. And we have discussed why at prong 2, ICE does not have the authority to set a rate. And you will look in vain for something in this declaration or the prior one that was filed by Ms. Valerio -- We found out last night she's actually serving as a paid consultant for GEO, and submitted the declaration in violation, apparently, of the agency's Touhy regulations, and I fear in violation of 41 U.S.C. 2104(a)(3). You will look in vain for something that says, "Here is the delegation from Congress that says $1 a day this year." The last time that happened was in 1978.

This is an improper forum. This motion to dismiss is an improper forum to resolve these issues. These are fact

questions. I would love to depose Mr. Johnson. I would love to depose Ms. Valerio. We have not had an opportunity to do that yet. Ms. Valerio was subpoenaed, and her testimony was replaced by some other ICE officials. It was scheduled for Washington, D.C. We later found out that the government was going to move to quash those subpoenas. GEO issued them, and ICE was going to move to quash them. We have not had an opportunity to test these propositions through documented fact discovery. And we should.

If you look at the cases on which GEO relies, they are resolved on summary judgment, not a motion to dismiss pre-depositions, pre-paper discovery.

An instructive case that we discovered after reading GEO's reply is Anchorage versus Integrated Concepts and Research, Inc. That is Judge Gleason in the District of Alaska.

THE COURT: I'm sorry, Judge who?

MR. FREE: Judge Gleason. 1 F. Supp. 3d 1001. And we point the court to Page 1012, particularly to Note 77.

Because this case is about derivative sovereign immunity, we think that the court should at least consider what courts have said about the nature of this defense, is it a jurisdictional defense, like actual sovereign

immunity, the immunity of the sovereign, or is it a merits defense? Is it a defense to liability? At Note 77 of this decision Judge Gleason analyzes that, and concludes it is the latter, it is a defense to liability, regardless of the nomenclature courts have used.

Judge Walton in the District of Columbia, In Re Fort Totten, 895 F.Supp. 2d 48 at Page 78, also discusses how this is not actually a jurisdictional defense; it is actually a liability defense.

And if you read Justice Ginsburg's opinion in Campbell-Ewald, the manner in which she disposes of the question, which is to take all inferences in a light most favored to the plaintiff, and avoid summary disposition, that is a summary judgment standard. She cites Matsushiba, I believe.

Again, that would not be the case if it were jurisdictional. The plaintiff would have the burden of proving jurisdiction, as it does in a 12(b)(1) factual attack. So we do not believe this is the proper forum to resolve these questions.

And with that, your Honor, unless you have any specific questions about Yearsley, I am going to hand it over to Mr. Whitehead to discuss the class certification.

THE COURT: I might ask you, and the defense may wish to respond to this -- if I can find my note. I

10:03:19AM wondered about this in regard to the elements to prove
10:03:24AM Yearsley immunity. The first thing is that the government
10:03:30AM authorized the contractor's actions. Does that mean in
10:03:38AM this setting that the government has to, for Yearsley to
10:03:44AM apply, authorize a dollar a day, or does it mean the
10:03:51AM government has to authorize the contractor to ignore the
10:04:00AM state law?

10:04:01AM MR. FREE: I think it is the latter, your Honor.
10:04:03AM We would point the court to Meyers versus the United
10:04:06AM States. That is a Ninth Circuit case from 1963. The cite
10:04:09AM there is 323 F.2d 580, and it is at Page 583. The Ninth
10:04:18AM Circuit looked at this authority prong and interpreted it
10:04:21AM as, "in conformity with the terms of said contract."

10:04:26AM So, in other words, it said the contractor is immune
10:04:29AM so long as it is in conformity with the terms of the
10:04:32AM contract. And once you fall out of conformity, you have
10:04:37AM exceeded the authorization of the government to pay.

10:04:41AM What we would contend in this case is that GEO is out
10:04:44AM of conformity with the term of the contract that requires
10:04:46AM it to continuously ascertain all applicable state and
10:04:50AM local laws; and that by not applying the most stringent
10:04:54AM law in the event of a conflict, specifically by not paying
10:04:58AM minimum wage, it is acting outside the federal
10:05:00AM government's authorization.

10:05:01AM The court will look in vain for any paragraph in the

10:05:06AM Johnson declaration filed this morning saying that ICE has
10:05:11AM authorized GEO to violate Washington's Minimum Wage Act.
10:05:17AM It is not there.
10:05:18AM If the court has no further questions, we will
10:05:21AM address the class cert.
10:05:35AM MR. WHITEHEAD: Good morning, your Honor. GEO
10:05:47AM relies upon civil immigration detainees participating in
10:05:53AM the Voluntary Work Program to operate the Northwest
10:05:58AM Detention Center on the Tideflats.
10:06:00AM As the court knows, these VWP workers are only
10:06:04AM compensated at the rate of $1 a day. Looking at the
10:06:07AM economic realities of the situation, we argue that an
10:06:10AM employment relationship exists between GEO and the
10:06:13AM detainee workers at the Northwest Detention Center, and,
10:06:18AM further, that GEO violates the Washington Minimum Wage Act
10:06:22AM by paying these workers sub-minimum wages.
10:06:26AM GEO obviously disagrees with our position. But when
10:06:30AM you look at the overarching questions in this case, they
10:06:35AM are common and predominate over any individualized
10:06:38AM questions. That being the case, the class vehicle is the
10:06:42AM best way, the superior means, by which to resolve the
10:06:46AM rights of hundreds of people, if not more, in one fell
10:06:51AM swoop. So for that reason, we look to certify a class.
10:06:54AM Rather than hustling through every element of
10:06:57AM Rule 23(a) or 23(b)(3), I would like to quickly, in the

limited time that I have, address the remaining points, the first of which is that GEO practically admits that common questions abound and predominate.

We have heard in its first motion to dismiss, in the context of the class certification motions, that there is a threshold question, the question of whether or not work authorization somehow precludes class certification if there is a preemption issue. This is a rehash of GEO's first motion to dismiss. In other words, they are arguing the threshold question is, could an employment relationship exist between the parties?

The court has already answered this question in the context of the motion to dismiss, denying that motion. And since then, the Central District of California has revisited the issue and analyzed and found there is no IRCA preemption.

Setting aside the fact that GEO is wrong on the law, in the context of class certification, it simply does not matter in the sense that there is an overarching question that is common to the class that is capable of a common answer. In that way the threshold question they have identified supports and undergirds our contention that there is a common overarching question that is capable of a common answer in this case.

Not only that, once you get past what they have

identified as the threshold question of, could an employment relationship exist, you then delve into whether or not an employment relationship did in fact exist.

The Washington State Supreme Court has devised an economic reality test, which is a multifactorial test that looks at the nature of the relationship between the parties. So when you are looking at the nature of the relationship, you are asking yourself questions, for example, who, when, where, what, and why of GEO's authority. Who could participate in the volunteer work program? Could they direct where and when they worked? Did they control the means of the production? In this instance, did they give them training? Did they give them equipment? Did they set the pay rate of a dollar a day? Does GEO rely upon the labor of the detainee workers to support its operations? These are overarching questions that are capable of a common answer.

Now, GEO will point to the granular aspects of the daily tasks. They will say, "Well, the work that was performed by the person that cleaned the kitchen is different than the work that was performed by the person that cleaned the bathroom."

They will point to security assessments: "Well, this person is high risk, and therefore they are confined to their pod," versus, "This person is deemed as a lower

10:09:34AM security risk and has more free-ranging ability throughout the facility."

10:09:38AM At the end of the day, those are questions that do not impact the scope of GEO's authority or the scope of the economic relationship between the parties.

10:09:48AM I mean, the relationship, however broad, however narrow, would be the same, irrespective of the tasks that are being performed on a daily basis.

10:09:58AM The second point that I want to look at is the fact that individual questions about damages do not predominate over the common questions regarding liability. The cases are legion. We cite them in our brief. Courts find in a wage-and-hour context when there is a common scheme, and the fact that there is a common question capable of a common answer, the fact that there are individualized damage inquiries does not somehow defeat class certification. That is almost always going to be the case in a wage-and-hour case, in that there are going to be different damages apportioned to different class members.

10:10:37AM The thing about a wage-and-hour case, of course, as the court well knows, those damages lend themselves to formulaic calculations. I mean, it is simply a matter of math in terms of figuring out what those damages are. So it does not necessarily defeat the overarching common question with respect to liability.

10:10:55AM Not only that, as we point out in our briefing,
10:10:59AM representative data may be used, sampling may be used to
10:11:03AM help in the quest to calculate the actual damages.
10:11:06AM The Supreme Court has endorsed this approach. In
10:11:09AM looking at Tyson Food v. Bouaphakeo, there is the notion
10:11:13AM that we can look to aggregate damages, meaning GEO's total
10:11:18AM liability, as a matter of math in figuring out what the
10:11:21AM total liability would be and then figuring out the
10:11:23AM proportionate share of damages for individual class
10:11:26AM members.
10:11:26AM The last point that I would like to address is the
10:11:28AM adequacy of the plaintiff, Fernando Aguirre-Urbina. There
10:11:36AM has been a late -- I think it was titled as a supplemental
10:11:39AM authority, that was submitted to the court, regarding his
10:11:42AM medical records, and arguing from those records that he is
10:11:45AM somehow an inadequate class representative.
10:11:48AM I think, first and foremost, GEO has waived these
10:11:51AM sort of arguments in that way, in that they did not
10:11:53AM address it in their motion to deny class certification,
10:11:57AM and did not address it squarely in their opposition to our
10:11:59AM motion to certify. So I think waiver has occurred in that
10:12:02AM way.
10:12:02AM Even if the court were to consider their arguments,
10:12:04AM what was true in the past of Mr. Aguirre-Urbina is
10:12:07AM certainly not true today. We submitted in somewhat of,

perhaps, an unusual step of giving the court the entire transcript, as well as the video, so that you could see for yourself that he withstood seven hours of very pointed questions, at times very disdainful questioning, and performed admirably. The question of adequacy is one as to whether or not there is a conflict between the proposed class rep and the class, and whether or not that person will help in the prosecution of the case. Mr. Aguirre-Urbina has done that ably in this matter.

Even to the extent -- assuming the court were to find somehow that he was inadequate as a class representative, well, he is one of two proposed class representatives. So that issue alone would not preclude class certification in this case.

In conclusion, what we are dealing with here, and you see this in the performance-based national detention standards, the contracts, and, frankly, from the argument this morning, that we are dealing with a common scheme. We are dealing with a common program as it relates to the VWP workers which GEO administrates.

In that way, the class vehicle is well suited to resolve the rights of these folks. So in that way, we urge the court to certify a class. It would not be the first court to do so, in the sense that in the District of Colorado there was a class certified of detainee workers

10:13:33AM which was recently upheld by the Tenth Circuit.

10:13:37AM Unless there are any further questions from the

10:13:38AM court, I would conclude my remarks.

10:13:41AM THE COURT: I may have some. Let's go ahead.

10:13:48AM Defense counsel reserved some time. Excuse me. Did you

10:14:04AM get the citations that counsel referred to as we went

10:14:09AM along? Nathan Nanfelt is one of my law clerks. He is the

10:14:16AM brains of the operation here. I sometimes wonder if

10:14:20AM lawyers realize how much they are arguing to law clerks as

10:14:25AM well as the judge. Anyway, go ahead.

10:14:29AM MR. EMERY: Your Honor, there is a daunting

10:14:32AM number of things to respond to here, but I think the first

10:14:34AM thing -- just one thing to revisit on Yearsley immunity

10:14:39AM is, again, to emphasize ICE pays the same amount at every

10:14:45AM facility. There is no reason to treat us different as a

10:14:48AM contractor. ICE funds the Voluntary Work Program because

10:14:54AM it is its program. It is a national program. If you read

10:14:57AM the declaration filed today, there is an emphasis

10:15:00AM throughout that they want uniformity.

10:15:03AM All of the paper that is put in this case -- They

10:15:06AM come in and produce some, you know, blips here and there,

10:15:12AM something from other cases. Let's talk about this case.

10:15:14AM They have alleged we pay $1 a day. That's what ICE tells

10:15:18AM us to do. That's what we are authorized to do.

10:15:20AM The second thing is to turn to the issue of

10:15:24AM employment. This is an important moment, because if the
10:15:28AM court allows these claims to go forward, and even
10:15:32AM considers them for class certification, it is turning its
10:15:37AM back on a considerable amount of agency experience and
10:15:42AM history. ICE has been operating detention facilities
10:15:46AM through contractors for decades. No state agency --
10:15:50AM nobody has ever come forward to GEO and suggested that it
10:15:53AM should be paying state-level minimum wages when Congress
10:15:57AM has expressly said what the rate is for payment, and ICE
10:16:01AM controls the money that goes to detainees.

10:16:05AM I would point you in particular to the FLSA opinions,
10:16:09AM that have gone back for decades, that draw a very simple
10:16:13AM distinction: Are detainees entitled to minimum wage under
10:16:19AM the FLSA? No. Why? Because they are not employees.
10:16:22AM They work for purposes of institutional maintenance. They
10:16:25AM are not out seeking a wage to help support themselves.

10:16:27AM When the detainees are in a facility they are
10:16:30AM supported, they have clothing, they have healthcare, they
10:16:33AM have food. They are not the particular wage earner, and
10:16:36AM they are not the recipient of the largess of state minimum
10:16:39AM wage laws.

10:16:40AM There is nothing in our contract that suggests that
10:16:43AM ICE ever intended us to subject -- to have our detention
10:16:48AM facilities and the VWPs run by the various different state
10:16:53AM laws where ICE has facilities.

10:16:55AM This is the same rationale that the --

10:16:57AM THE COURT: If that's the case, why is that

10:16:59AM provision in the contract regarding state and local laws?

10:17:07AM MR. EMERY: Because there are a number of state

10:17:09AM laws that we are required to -- For example, there are

10:17:13AM different federal laws. The VWP complies with OSHA, with

10:17:18AM state labor laws. That has been expressed. There is

10:17:21AM definitely room for that. It doesn't mean that no state

10:17:24AM laws are relevant.

10:17:26AM But on an issue on which Congress has expressly

10:17:29AM spoken, expressly set a rate, now and hereafter there is

10:17:34AM no -- there is simply no plausible understanding that ICE

10:17:37AM intended for state minimum wage laws everywhere it has

10:17:41AM facilities to set what that rate is.

10:17:44AM I mean, if ICE had intended state minimum wages,

10:17:49AM which are at least 11, $12 an hour, how does that make

10:17:53AM sense with the at least $1 per day provision? Why would

10:17:57AM ICE have that provision, use that language, if it intended

10:18:00AM the state minimum wage laws would work at any given state?

10:18:07AM There has been talk in the briefing and today about

10:18:12AM the economic reality test. Your Honor, there is only one

10:18:15AM economic reality that matters here. If Mr. Nwauzor,

10:18:19AM Mr. Aguirre, Mr. Chen, and likely just about anybody in

10:18:24AM their class, had come to GEO while they were detained and

10:18:28AM asked to become a GEO employee, they would have said, "No

chance to do so." Why? Because they were forbidden by federal law from doing so by their detention status. They either had criminal convictions, which would have prohibited --

THE COURT: What if GEO is in fact, under an economic reality test, employing these people? The law is against the employer from employing people that are not employable. It doesn't prevent any illegal immigrant from working.

MR. EMERY: I understand your Honor's position on that. What really is the reality --

THE COURT: It is not my position. It is a question.

MR. EMERY: Okay. I understand the question. What is the reality of saying that we treated them like employees? We absolutely did not treat them as employees.

Do you know what our employees need to do to pass a background check? Do you know the expectations of them to be able to -- Our employees, we can tell them what to do, when to show up for work, what to do.

Think of the typical detainee. ICE tells them when to come to the facility, ICE says when they leave, ICE says what classification level they can work at, which drastically restricts the jobs they work. ICE even decides on a shift-by-shift basis who can actually work in

10:19:44AM 1 the program.
10:19:45AM 2 This is going back to Page 82 of the contract, where
10:19:49AM 3 we were before. I would direct you to the very bottom
10:19:53AM 4 paragraph on this page. It says, "It will be the sole
10:19:58AM 5 responsibility of ICE to determine whether a detainee will
10:20:03AM 6 be allowed to perform on voluntary work details and at
10:20:06AM 7 what classification level." "The sole responsibility of
10:20:11AM 8 ICE."
10:20:15AM 9 Mr. Kimble's declaration explains how this process
10:20:18AM 10 works. There are kites that are put out, GEO puts
10:20:21AM 11 together a list which is approved by ICE. ICE can take
10:20:24AM 12 any single person off this list they want. How on earth
10:20:28AM 13 is it the economic reality that GEO is the employer of any
10:20:31AM 14 of these detainees? They are in federal immigration
10:20:37AM 15 detention. They are in the federal government's custody.
10:20:39AM 16 The federal government says what is done to them.
10:20:42AM 17 The very last thing, quickly, is class certification.
10:20:45AM 18 Your Honor, the main thing I want to say here is we know
10:20:47AM 19 so little about these claims. We know so little about
10:20:50AM 20 them. You saw them rattle off, "Oh, we are going to do a
10:20:53AM 21 model of this, we are going to do a model of that." The
10:20:56AM 22 first gauntlet that any class member would have to do is
10:20:59AM 23 to show that they are authorized to work for us when they
10:21:02AM 24 are at --
10:21:02AM 25 THE COURT: Wait a minute. Wait a minute. Why

do they have to show that they are authorized to work when in fact they are working?

MR. EMERY: They are not. They are voluntarily participating in the Voluntary Work Program. GEO knows who works for them, because they pass all of our employment verification tests. None of these detainees did. They performed work as the government said that they could volunteer to do for a pay rate the government said they could do.

If there is going to be a class, it is going to have to be a class of people who actually were authorized to be our employees. None of these folks were. None of the named plaintiffs so far have met that. And they haven't pointed to a single class member --

THE COURT: There are examples all over the country of illegal immigrants who get work. And because they are illegal, their employers pay them less than minimum wage, because they think they can't complain. There are instances where -- we see cases where people in fact come into the country and are effectively enslaved and required to work without pay. The Minimum Wage Act is designed to protect the workers from being abused by employers. Employers are the ones that are restricted from hiring people that aren't qualified to work in the country. But the workers are not so limited.

10:23:13AM 1 I guess what I'm leading up to is this: Isn't this
10:23:17AM 2 all a jury question? You guys asked for a jury, to my
10:23:21AM 3 great relief. Isn't it a jury question as to what the
10:23:27AM 4 employment relationship, if any, was, and how these
10:23:36AM 5 various contract provisions and legal provisions should be
10:23:41AM 6 applied?
10:23:44AM 7 MR. EMERY: It absolutely is not. Your Honor, I
10:23:46AM 8 appreciate the concern. I recognize that that is the
10:23:49AM 9 objective of a lot of state minimum wage laws. The folks
10:23:54AM 10 in the unfortunate position you are talking about are not
10:23:57AM 11 supported with food, and clothing, and healthcare, and
10:24:00AM 12 medical care at U.S. taxpayer expense.
10:24:04AM 13 THE COURT: Some of them get various benefits
10:24:06AM 14 from their employers.
10:24:08AM 15 MR. EMERY: They may. The Salas case is actually
10:24:12AM 16 quite a good case on this point, your Honor. Salas says
10:24:15AM 17 you may have to pay back -- an employer might have to pay
10:24:20AM 18 backpay if they sort of willfully ignore the detention
10:24:23AM 19 status of the detainee and employ them. Once it is
10:24:27AM 20 determined that they are unlawfully working, there is no
10:24:30AM 21 more obligation to pay backpay.
10:24:33AM 22 We know from the day they step into our facility they
10:24:36AM 23 are not employees. There is no work authorization, and
10:24:39AM 24 therefore no state minimum wage laws are going to apply.
10:24:44AM 25 We are in a different universe here. The detainees

aren't here because they are being exploited. The detainees are here because they are in the federal government's custody. If that's what the root issue is, there is a complaint about their custody itself, and the fact that they are in a federal detention facility, this is entirely the wrong case. That's an action that should be brought directly against the U.S. government, and not its federal contractor. It is another reason why Yearsley applies to us.

THE COURT: Thank you. Let me see if I have any other questions I want to put to you. I had a list of things.

MR. EMERY: Should I sit down or stay up?

THE COURT: Suit yourself, as long as you speak into the mic when you talk to me. I guess the only question I have is the process for authoring policies listed in the detainee handbook. Can somebody fill me in on that, what the process is?

MS. MELL: Your Honor, the position of GEO is that the oversight on the PBNDS standards by Congress requiring routine updates as to its implementation of PBNDS standards have set a Congressional level of authority to enforce those regulations.

THE COURT: I think you misunderstand my question. I am talking about the process for preparing

10:27:40AM 1 the detainee handbook and the policies that are in the
10:27:46AM 2 handbook.
10:27:46AM 3 MS. MELL: From GEO's perspective?
10:27:49AM 4 THE COURT: No. No. Not from somebody's
10:27:52AM 5 perspective. What is the process?
10:27:54AM 6 MS. MELL: I am asking whether you are inquiring
10:27:56AM 7 of the PBNDS standards or GEO's standards?
10:28:01AM 8 THE COURT: You see, let me explain what I am
10:28:05AM 9 talking about. We have all this reference to not less
10:28:10AM 10 than a dollar a day, and then in the handbook it says $1 a
10:28:16AM 11 day. It is not not less than. It says $1 a day is what
10:28:19AM 12 they will be paid. My question is, what is the process to
10:28:25AM 13 get from the standards and the contract over to the policy
10:28:34AM 14 as stated in the handbook?
10:28:36AM 15 MS. MELL: Your Honor, there are two separate
10:28:38AM 16 handbooks. I just want to be clear. When the detainee
10:28:41AM 17 comes into the facility, they get the ICE national
10:28:45AM 18 detention standard detainee handbook. That says for those
10:28:49AM 19 detainees who have been participating within the requisite
10:28:54AM 20 period that we are talking about here shall receive $1 a
10:28:57AM 21 day.
10:28:58AM 22 GEO, the detention facility, promulgates a second
10:29:02AM 23 detainee handbook that mirrors what is in the ICE
10:29:09AM 24 handbook. They just duplicate it. And then those are
10:29:13AM 25 both available in dual languages and disseminated to the

10:29:17AM 1 detainees at the facility.
10:29:19AM 2 So in terms of how it happens, GEO relies on the
10:29:23AM 3 detainee handbook that is provided by ICE.
10:29:29AM 4 MR. FREE: Paragraph 8 of the ICE declaration
10:29:31AM 5 filed this morning essentially says, on Page 3 of the
10:29:43AM 6 declaration, that the performance-based contracts, like
10:29:48AM 7 the one at Tideflats, don't designate how a contractor
10:29:52AM 8 performs the work, i.e., from the facility, but rather
10:29:55AM 9 establishes the expected outcomes and the results.
10:29:58AM 10 The national detainee handbook has never gone through
10:30:01AM 11 any sort of Congressional oversight. It is not
10:30:06AM 12 incorporated into the contract. The PBNDS is incorporated
10:30:11AM 13 into the contract, that says at least $1 a day. The
10:30:14AM 14 national detainee handbook, to the extent it says "shall,"
10:30:17AM 15 is in conflict. But ICE says it's GEO. If you look at
10:30:21AM 16 the contract, the contractor -- the very first line of the
10:30:24AM 17 Voluntary Work Program section, the contractor is to
10:30:31AM 18 develop the work plan.
10:30:33AM 19 MS. MELL: Your Honor, I just want to point out
10:30:35AM 20 on this specific issue that ICE actually approves the
10:30:38AM 21 Northwest Detention Center's version of its detainee
10:30:41AM 22 handbook. It is reflected on the exhibit itself.
10:30:44AM 23 THE COURT: Okay. Thank you. As I indicated, we
10:30:49AM 24 have already done a lot of work on this. With all these
10:30:59AM 25 issues raised, as I indicated, it is partly a question of

what is the law that I should apply now and what are jury questions that come later. That's part of the analysis we have to deal with, I think, in coming to conclusions on these motions.

I also wanted to say I am aware on the motion to deny -- on the motion to dismiss the amended complaint there are some issues that are revisited from the original motion to dismiss. We have revisited those, even though there is a question raised about whether they are properly before the court. I felt I ought to look at them anew anyway, which we have done. So that will be reflected in the order we will issue.

Thank you very much. A lot of the same old, same old stuff going on here. We will try and do an appropriate analysis.

Do you have something further, Ms. Mell?

MS. MELL: Your Honor, I just was concerned that there was at least some oral presentation by the opposition as to the Tracey Valerio declaration. And it is GEO's position that ICE has not instructed us to withdraw the declaration, that the Touhy issue in play is the application of 5 CFR 2635.805, which says that experts like Tracey Valerio can testify as long as they are not testifying in a case where it is a party. To the extent we need to brief it --

10:33:01AM 1 THE COURT: Ms. Mell, I read her declaration, and
10:33:08AM 2 saw who she is and where she came from, and the contents
10:33:12AM 3 of her declaration. I didn't think it made a whole lot of
10:33:16AM 4 difference in anything. The same thing is true of the
10:33:23AM 5 later ICE declaration, it just didn't add a lot to the
10:33:30AM 6 issues I have to decide.
10:33:34AM 7 MS. MELL: Thank you, your Honor.
10:33:35AM 8 THE COURT: What you do about it, whose fault
10:33:38AM 9 that was, who turned ICE on about that is not my concern.
10:33:47AM 10 MS. MELL: Thank you, your Honor.
10:33:49AM 11 THE COURT: Okay. Thank you.
12 (Proceedings adjourned.)
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C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

/s/ Barry Fanning
Barry Fanning, Court Reporter